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(30,521)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. [REDACTED] 146

**ARMIN A. SCHLESINGER, HENRY J. SCHLESINGER,
AND MYRON T. MacLAREN, EXECUTORS OF THE
LAST WILL AND TESTAMENT OF FERDINAND
SCHLESINGER, DECEASED, PLAINTIFFS IN ERROR,**

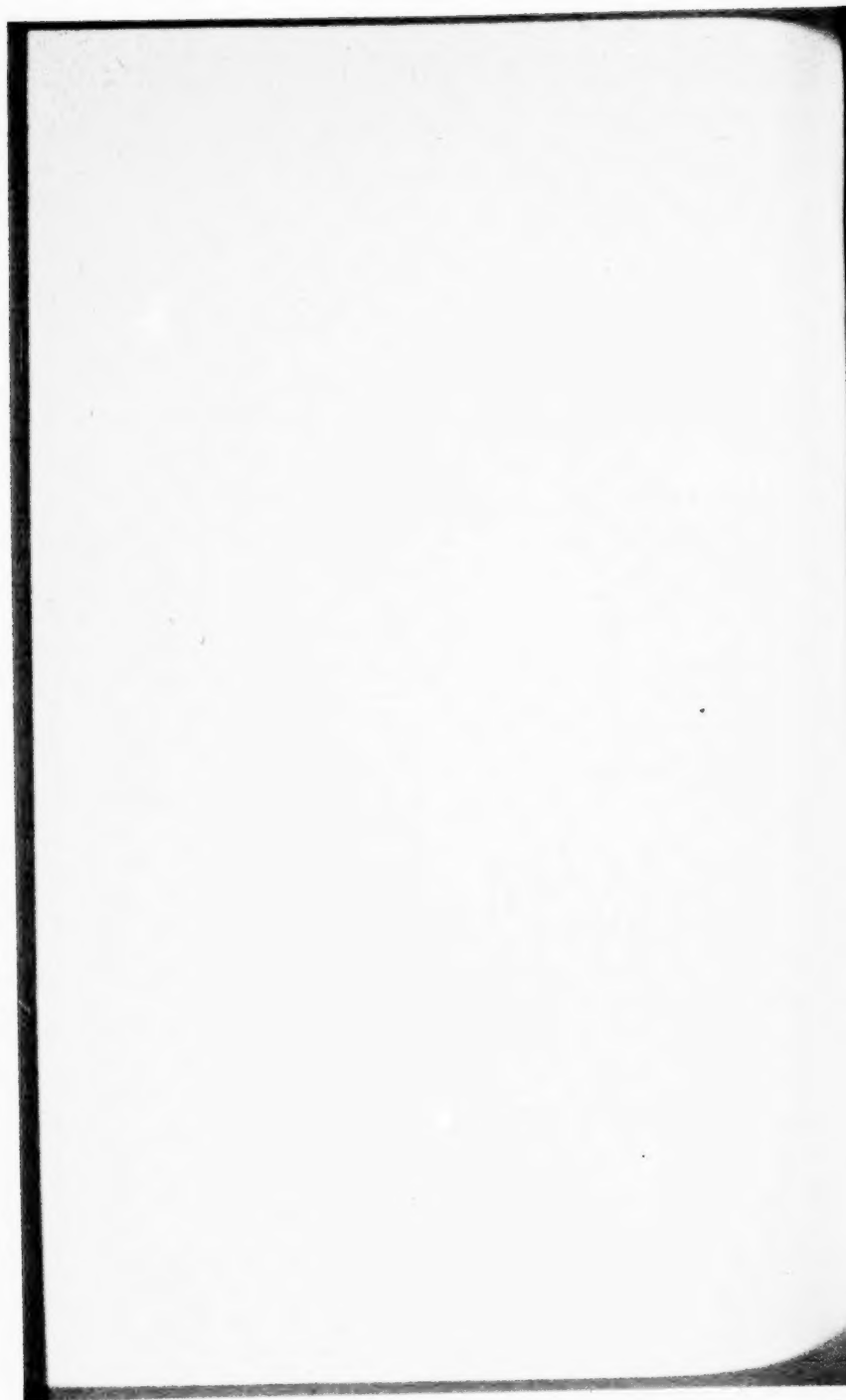
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**THE STATE OF WISCONSIN AND COUNTY OF
MILWAUKEE.**

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF FOR PLAINTIFFS IN ERROR.

✓ **CHARLES F. FAWSETT,**
Counsel for Plaintiffs in Error.



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SUPREME COURT OF THE UNITED STATES

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No. 556

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AND MYRON T. MACLAREN, EXECUTORS OF THE
LAST WILL AND TESTAMENT OF FERDINAND
SCHLESINGER, DECEASED, PLAINTIFFS IN ERROR,**

v. s.

**THE STATE OF WISCONSIN AND COUNTY OF
MILWAUKEE.**

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF FOR PLAINTIFFS IN ERROR.

This is a writ of error to review a judgment of the Supreme Court of the State of Wisconsin affirming a final order or judgment of the County Court of Milwaukee County imposing an inheritance tax on certain gifts made by the above named decedent several years prior to his death, which plaintiffs in error as the executors of his last will and testament were required to pay from his estate.

The statute under which the tax was imposed is claimed by plaintiffs in error to be in violation of the 14th Amendment of the Constitution of the United States upon the ground that it deprives them and the beneficiaries of the estate of the deceased, of their property without due process of law and denies to them the equal protection of the law.

STATEMENT OF THE CASE.

The statute in question is *Section 1 Chapter 44* of the Laws of Wisconsin enacted in the year 1903 and amended by *Chapter 643* of the Laws enacted in 1913. The section as it stood before the amendment of 1913, omitting parts not material, provided:

"A tax shall be and is hereby imposed upon any transfer of property, real, personal or mixed . . . to any person . . . within the state in the following cases;

(1) When the transfer is by will or by the intestate laws of this state, from any person dying possessed of the property while a resident of the state

(3) When the transfer is of property made by a resident . . . by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor or intended to take effect in possession or enjoyment at or after such death."

The amendment of 1913 added to subdivision (3) last above quoted, the following:

"Every transfer by deed, grant, bargain, sale or gift, made within six years prior to the death of the grantor, vendor or donor, of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without any adequate valuable consideration, shall be construed to have been made in contemplation of death within the meaning of this Section."

The above provisions at the time of the death of the decedent, January 3, 1921, were codified as part of *Chapter 64ff* Wisconsin Statutes 1919, followed by other provisions in the Chapter, fixing the rates and providing for the determination assessment and collection of the tax. They are now codified in *Chapter 72 Wisconsin Statutes*, 1925, in sections beginning with *Section 72.01*. The only one of such other provisions which needs to be here referred to, is that imposing liability for the tax, which provides:

"All taxes imposed by this act shall be due and payable at the time of the transfer . . . and every such tax shall be and remain a lien upon the property transferred until paid, and the person to whom the property is transferred and the administrators, executors and trustees of every state so transferred, shall be personally liable for such tax until its payment." *Sec. 1087-5 Wisconsin Statutes 1919. Sec. 72.05 Wisconsin Statutes 1925.*

The decedent died as above stated on the 3rd of January, 1921, a resident of the County of Milwaukee, State of Wisconsin, leaving an estate, including the gifts referred to, made to members of his family within six years prior to his death, in the total amount of \$8,485,581.78. (Rec. 28) The gifts referred to aggregated \$6,421,708.90. (Rec. 28) *

As the law has been construed by the Supreme Court of the State, all gifts made by a decedent in contemplation of death are regarded for the purposes of the determination assessment and collection of the tax thereon, as part of the estate of the decedent. (*Estate of Stephenson*, 171 Wis. 452, 456)

In the proceedings in the County Court of Milwaukee County for the determination of the tax, that being the court having jurisdiction in the premises, (*Estate of Shepard*, 184 Wis. 88; *Will of Porter*, 178 Wis. 556) the executors objected to the inclusion in the estate, of the gifts referred to, for the purposes of the tax, on the ground that they were not in fact made in contemplation of death or intended to take effect in possession or enjoyment at or after the death of the decedent, and that in so far as the statute required them to be construed as having been made in contemplation of death, it is in contravention of Section 1 of the 14th Amendment of the Constitution of the United States, in that it deprives the executors and the beneficiaries of the estate of their property without due process of law and denies to them the equal protection of the law.

The Court received the evidence offered upon the question of fact as to whether the gifts were made in contemplation of death, or to take effect in possession or enjoyment at or after the death of the donor, for the purposes of the constitutional question thus raised; and thereafter duly made findings of fact and conclusions of law, in which it was held that the gifts referred to were not in fact made in contemplation of death or intended to take effect in possession or enjoyment at or after the death of the decedent; but that the statute requiring them to be construed as having been made in contemplation of death because made within six years prior to the death of the donor, was constitutional and valid and that said gifts were subject to the tax under the terms of the statute. (Rec. 22-25)

From the final order or judgment of the County Court determining and imposing the amount of the tax in accordance with the terms of the statute on the gifts in question, the executors appealed to the Supreme Court of the state, (Rec. 4-7) wherein the objection to the validity of the statutes on the grounds stated above, were renewed. (Rec. 4-7)

*References to Record are to the Printed Transcript.

The judgment of the Supreme Court on the appeal, with one of the Justices dissenting, affirmed in all respects the judgment of the County Court, (Rec. 42) and this writ of error was duly allowed by the Court to review its judgment so rendered. (Rec. 1)

The opinion and decision of the state supreme court, will be found at pages 42 to 47 of the record.

As will be noted from the opinion, no exception was taken to the correctness of the finding of the county court that the gifts were not in fact made in contemplation of death or intended to take effect in possession or enjoyment at or after the death of the decedent, and the judgment of the appellate court was rendered on the basis that such finding was correct.

SUMMARY OF THE OPINION OF THE STATE SUPREME COURT.

The principal grounds upon which the decision of the court was based, may be summarized as follows:

1. The tax in question is not a property tax *but a tax upon the right to receive property from a decedent.* (Rec. 44; Italics ours)

2. The amendment to the statute does not create two classes of gifts, one of gifts in contemplation of death and another of gifts made within six years though not in contemplation of death. The legislative intent was to tax *only gifts made in contemplation of death. That is the only class created.* (Rec. 44, 45; Italics ours)

3. "The legislature says that all gifts made within six years of the donor's death shall be construed to be made in contemplation of death, bringing such gifts within the only class created, namely, gifts made in contemplation of death. Waiving the question of whether the legislature could bring gifts made within six years within the class, it is quite obvious that only one class is created and that a valid one, *for gifts made in contemplation of death stand upon a different basis than ordinary gifts made inter vivos.* It was the former the legislature sought to reach in order to insure a reasonably effective enforcement of the inheritance tax." (Rec. 45; Italics ours)

4. The legislative declaration in the statute that all gifts made within six years of death shall be construed to be made in contemplation of death means, "that *they shall conclusively be held to be gifts made in contemplation of death and shall fall within the one taxable class of gifts created by the legislature.*" (Rec. 45; Italics ours)

5. "The legislature cannot change the essential nature of an existing fact, but it can, on grounds of public policy, give a certain legal import to a fact, and for purposes of classification and for a practical administration of laws it may include in one class cases that fall without it considered individually, but usually falling within it collectively considered." (Rec. 45)

6. "*The difficulty of proving that such gifts were made in contemplation of death* coupled with the public necessity of not allowing large estates to escape the provisions of the law induced the legislature" to adopt the amendment. (Rec. 45; Italics ours)

7. "While it may be granted that as to a particular gift not made in contemplation of death the legislature could not declare it to be one made in contemplation of death, it does not by any means follow that in establishing a general class it cannot draw into that class gifts strictly not falling within it, provided that gifts of that class are usually and ordinarily of the kind which the class calls for, and especially where a practical and efficient administration of the law demands the classification." (Rec. 45)

8. "It is quite true we think to say that of the gifts coming under the statute made by residents of Wisconsin within six years of their death by far the greater proportion thereof have actually been made in contemplation of death. At any rate there is sufficient basis in fact for the truth of such statement to permit the legislature to act upon it and make a classification accordingly." (Rec. 45, 46)

9. "The legislature does not say that a gift not made in contemplation of death is actually made in contemplation of death. What it says is that if the gift is made within six years of the donor's death it shall for taxation purposes be construed to fall within the class of gifts made in contemplation of death." (Rec. 46)

10. "Where the legislature acts in its own field in making classifications or in construing the legal import of what constitutes a class, courts will not interfere unless it quite clearly appears that there is no just basis for the classification or for the legal import. In this case for reasons already stated we think the class created by the legislature for taxation was a valid one, and that on grounds of public policy and in order to permit a practical and efficient administration of the inheritance tax laws it could import into the created class all gifts made within six years of the donor's death." (Rec. 46)

11. *The legislative intent is clear that the specified gifts were to be conclusively construed to be gifts in contemplation of death.* (Rec. 47; Italics ours)

12. *The answer to the objection* that the law makes an invalid classification because it taxes gifts not made in contemplation of death if made within six years before the death of the donor, but does not tax similar gifts made at a longer period before the death of the donor is that "where there is classification by division of time, by number or by weight there must be an arbitrary line drawn somewhere and if the line drawn by the legislature cannot be said to be clearly wrong it must stand." (Rec. 47)

13. "We (the court) agree with the applicants that *the classification made will not support a tax as one on gifts inter vivos only. Under such taxation the classification is wholly arbitrary and void.* We perceive no more reason why such gifts inter vivos should be taxed than gifts made within six years of marriage or any other event. It is because only one class of gifts closely connected with and a part of the inheritance tax law is created that the law becomes valid. *Gifts made in contemplation of death stand in a class by themselves, and as such they are made a part of the inheritance tax law to the end that it may be effectively administered.*" (Rec. 47; Italics ours)

SPECIFICATION OF ERROR RELIED UPON.

I.

The Supreme Court of Wisconsin erred in affirming by its judgment the final order and judgment of the County Court of Milwaukee County which adjudged that the gifts made by Ferdinand Schlesinger, deceased, to his wife and children within six years prior to his death, but which were not as a matter of fact made in contemplation of his death, were to be construed as having been made in contemplation of death and were subject to the taxes imposed upon transfers of property made in contemplation of death under the Statutes of Wisconsin, and particularly of those portions of Section 72.01 of said Statutes which read as follows:

"Section 72.01. A tax shall be and is hereby imposed upon any transfer of property, real, personal or mixed
 " * * * to any person, association or corporation
 " * * * in the following cases * * *

(3) When the transfer is of property made by a resident, or by a non-resident when such non-resident's property is within this State or within its jurisdiction, by deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or

after such death. Every transfer by deed, grant, bargain, sale or gift made within six years prior to the death of the grantor, vendor, or donor, of a material part of his estate, or in the nature of a final disposition or distribution thereof, without an adequate valuable consideration, shall be construed to have been in contemplation of death within the meaning of this Section",

and in adjudging, contrary to the contention of these plaintiffs in error, that said provisions of the Statutes, as applied to the gifts so made to the decedent's wife and children as aforesaid, but not made in contemplation of the death of the donor, nor intended to take effect in possession or enjoyment at or after his death, are valid and not in conflict with, or in violation of Section (1) of the Fourteenth Amendment to the Constitution of the United States and particularly that portion of Section (1) of said Amendment which reads as follows:

"Nor shall any State deprive any person of life, liberty or property without due process of Law;

or that portion of Section (1) of said Fourteenth Amendment which reads as follows:

"Nor (shall any State) deny to any person within its jurisdiction the equal protection of the Laws."

II.

The Supreme Court of Wisconsin erred in refusing to adjudge, as requested by said plaintiffs in error, that the gifts which were made by the decedent to his wife and children within six years next, prior to his death and which were not, as matter of fact, made in contemplation of the death of the donor, nor intended to take effect in possession or enjoyment at or after his death, were not subject to the inheritance tax imposed by the said Statutes of Wisconsin; and that the provisions of Section 72.01, Clause (3) of the Wisconsin Statutes, which prescribe that such gifts shall be subject to the tax thereby imposed upon transfers made in contemplation of death and shall be construed to have been made in contemplation of death within the meaning of said Section, although not in fact made in contemplation of the death of the donor, nor intended to take effect in possession or enjoyment at or after his death, are invalid, unconstitutional and void, as being in conflict with and in violation of Section (1) of the Fourteenth Amendment to the Constitution of the United States and particularly of that portion of Section (1), of said Amendment which reads as follows:

"Nor shall any State deprive any person of life, liberty or property without due process of law;"

and that portion of Section (1), of said Amendment which reads as follows:

"Nor (shall any State) deny to any person within its jurisdiction the equal protection of the Laws."

III.

The said judgment of the Supreme Court of Wisconsin, affirming the said judgment of the County Court of Milwaukee County is repugnant to and in conflict with the provisions of Section (1), of the Fourteenth Amendment to the Constitution of the United States, and particularly those portions of Section (1), of said Amendment which read as follows:

"Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the Laws."

QUESTIONS RAISED.

The only provision of the statute to which exception is taken by plaintiffs in error is that part which was added by the amendment of 1913, reading as follows:

"Every transfer by deed, grant, bargain, sale or gift, made within six years prior to the death of the grantor, vendor or donor, of a material part of his estate or in the nature of a final disposition or distribution thereof, and without any adequate valuable consideration, shall be construed to have been made in contemplation of death within the meaning of this Section."

The contentions of plaintiffs in error with respect to this provision are:

1. That it deprives them of their property without due process of law, in that it arbitrarily and as the result of the conclusive presumption which it creates, places the gifts in this case, which were not in fact made in contemplation of death, in the class of gifts made in contemplation of death, and imposes upon them *as gifts made in contemplation of death*, contrary to the fact, the inheritance tax provided for in the statute which as held by the State Court, was intended to be imposed and can lawfully be imposed only on inheritances or transfers in the nature of inheritances.

2. The result of said provision is to make the classification of the statute for the purposes of the tax invalid, by arbitrarily importing into the class subject to the tax, transfers which are foreign to the basis of classification and not related thereto. Also, because it results in an unlawful discrimination by importing into the class subject to the tax, certain gifts *inter vivos* not made in contemplation of death, while excluding from the class on which the tax is imposed other gifts of the same character made under like circumstances and conditions as those which are made subject to the tax.

3. The right to make an ordinary gift of money or property which may be completed by manual delivery is a property right. Because the gifts in this case include property of that character, and the tax imposed is at a progressive rate, different from other property taxes, the statute denies to plaintiffs in error the equal protection of the law.

BRIEF OF ARGUMENT.

POINT I.

THE TAX IMPOSED BY THE STATUTE ON GIFTS INTER VIVOS IS AN INHERITANCE TAX, AND THE BASIS OF CLASSIFICATION OF SUCH GIFTS FOR THE PURPOSES OF THE TAX AND THE ONLY BASIS WHICH WOULD JUSTIFY SUCH A TAX, IS THAT THE GIFTS WERE MADE IN CONTEMPLATION OF DEATH. THE STATUTE AS CONSTRUED BY THE COURT, BRINGS THE GIFTS IN THIS CASE AND OTHERS OF LIKE CHARACTER, WITHIN THE BASIS OF THE CLASSIFICATION MADE BY THE STATUTE, BY A CONCLUSIVE PRESUMPTION WHICH DENIES TO PLAINTIFFS IN ERROR THE RIGHT TO PROVE THAT THE GIFTS IN THEIR CASE WERE NOT IN FACT MADE IN CONTEMPLATION OF DEATH, AND IMPOSES THE TAX UPON THEM AS GIFTS MADE IN CONTEMPLATION OF DEATH CONTRARY TO THE FACT, AND THEREBY DEPRIVES THE PLAINTIFFS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

The construction placed upon the statute by the highest court of the state must be read into the statute as though explicitly a part thereof.

Fairfield v. County of Gallatin, 100 U. S. 47, 50.

As construed by the state court, the statute creates but one class of gifts *inter vivos* for the purposes of the tax, and that is, *gifts made in contemplation of death*.

Thus in the opinion it is said:

"The second objection that the basis of classification is wrong because there are two classes, one of gifts made in contemplation of death and another of gifts made within six years though not in contemplation of death *misinterprets the legislative intent. Such intent was to tax only gifts made in contemplation of death. That is the only class created.* * * * Waiving the question of whether the legislature could bring gifts made within six years within the class it is quite obvious that only one class is created and that a valid one, *for gifts made in contemplation of death stand upon a different basis than ordinary gifts made inter vivos.*" (Rec. 44, 45; Italics ours)

"* * * the tax in question is not a property tax but a tax upon the right to receive property from a decedent." (Rec. 44)

Nothing could be clearer than the construction placed by the court upon the statute, that the tax is an *inheritance tax*; that the basis of the classification of gifts *inter vivos* for the purposes of the tax is the fact of the gifts which are made subject to the tax having been made "in contemplation of death"; and that this basis of the classification *is essential to the validity of the tax*, because it is an inheritance tax imposed "*upon the right to receive property from a decedent*," and not a tax upon any ordinary transfer of property *inter vivos*.

It is obvious that the only possible justification there could be for imposing an inheritance tax on a gift *inter vivos* is that the gift was made in contemplation of death or was not intended to take effect in possession or enjoyment until at or after the death of the donor.

Without referring to authorities elsewhere as to the essential nature of the transfers which are *the basis of the classification*, we quote from the supreme court of Wisconsin construing the statute in question as follows:

"The statute was not intended to restrict persons in their right to transfer property in all legitimate ways, but it clearly manifests the purpose to tax all transfers which are accomplished by will, the intestate laws, and those made prior to death which can be classed as similar in nature and effect because they accomplish a transfer of property under circumstances which impress upon it the characteristics of a devolution made at the time of the donor's death." (Italics ours)

State vs. Pabst, 139 Wis. 561 at page 595.

As held by the court in the instant case, gifts made in contemplation of death, "*stand in a class by themselves* and as such they are made a part of the inheritance tax law". (Rec. 17)

Whether or not a gift was made in contemplation of death, as these words are used in the inheritance tax laws, is of course, a question of fact and *was established to be such* by the decisions of the supreme court of Wisconsin at the time the amendment to the statute of which we complain was adopted.

In *State vs. Pabst*, *supra*, 139 Wis. 561, decided at the January term of the Court in 1909, in defining the meaning of these words, the Court said:

"The meaning of the words 'in contemplation of death,' as used in the Statute, must be inferred and ascertained from the context of the act and the object sought to be accomplished by the Law. It is manifest that they were intended to cover transfers of parties who were prompted to make them by reason of the expectation of death, and which, in view of that event, accomplish transfers of the property of decedents in the nature of a *testamentary disposition*. It is therefore obvious that they are not used as referring to that expectation of death generally entertained by every person. The words are evidently intended to refer to an expectation of death which arises from such a bodily or mental condition as prompts persons to dispose of their property and bestow it on those whom they regard as entitled to their bounty." (p. 589, 590).

In *State vs. Thompson*, 154 Wis. 320, 328, decided at the January term of the Court in 1913, the same year in which the Amendment to the Law here in question was passed and only a few months prior to its passage, the Court reaffirmed this definition in the following terms:

"It was held in *State v. Pabst*, 139 Wis. 561, 121, N. W. 351, that the words 'in contemplation of death' as used in the Statute quoted were '*not used as referring to that expectation of death generally entertained by every person.*' Speaking affirmatively the opinion proceeds: 'The words are evidently intended to refer to an expectation of death *which arises from such a bodily or mental condition as prompts persons to dispose of their property* and bestow it on those whom they regard as entitled to their bounty.' In further explanation of the phrase it is said: 'A gift is made in contemplation of an event when it is made in expectation of that event and having it in view, and a gift made when the donor is looking

forward to his death *as impending, and in view of that event, is within the language of the Statute.*'"

In the same case it is further said:

"The definition of the words 'in contemplation of death' given in the *Pabst* case does not differ from that announced by the New York Court in *Matter of Baker*, 83 App. Div. 530, 82 N. Y. Supp. 390 (affirmed 178 N. Y. 575, 70 N. E. 1094) where it is said:

"This court has held that the words *in contemplation of death* do not refer to that general expectation which every mortal entertains, but rather to the apprehension which arises from some existing condition of body or some impending peril'.

Neither does it differ from the interpretation put upon the words by the Illinois Court in *People vs. Burkhalter*, 247 Ill. 600, 604, 93 N. E. 379, where it held that contemplation of death *must be the impelling motive* for making the gift in order that it be subject to an inheritance tax.

It is only gifts made in contemplation of death that are taxable." (pp. 328, 329) (Italics ours)

Not only is the question of whether or not a gift was made in contemplation of death, a question of fact, but the tax imposed upon such gifts *as an inheritance tax* is a different kind of tax, having its origin in a different source as regards the taxing power of the state from other kinds of taxation.

Knowlton v. Moore, 178 U. S. 41; 56; 20 Supt. Ct. Rep. 747, 753 and cases cited in opinion.

As held by this court in that case, the taxing power in this class of taxation rests upon the foundation principle,

"that death is the generating source from which *the particular taxing power takes its being and that it is the power to transmit or the transmission from the dead to the living on which such taxes are more immediately rested.*" (Italics ours)

Referring to numerous cases, federal and state, in which the constitutionality of such taxes has been upheld, the Court said:

"It is not necessary to review these cases or state at length the reasoning by which they are supported. They are based on two principles. 1. An inheritance tax is

not one on property but one on the person. 2. The right to take property by devise or descent is a creation of the law and not a natural right—a privilege; and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the State may tax the privilege, discriminate between the relations and between those and strangers, and grant exemptions; and are not precluded from their power by the provisions of the respective State Constitutions requiring uniformity and equality of taxation. (Italics ours.)

Id. p. 55.

And again,

"Taxes of this general character are universally deemed to relate not to property *in se* but to its passage by will or by descent in cases of intestacy as distinguished from taxes imposed on property, real or personal as such because of its ownership and possession. In other words, the public contribution which death duties exact is predicated on the passage of property as the result of death as distinct from a tax on property disassociated from its transmission or receipt by will or as the result of intestacy." (Italics ours.)

Id. p. 52.

The power to impose such taxes is not limited by the usual constitutional restrictions in state constitutions which apply to other kinds of taxation. *Cooley Taxation* (4th Ed.) 885-1729.

The basis of the classification of gifts *inter vivos* for the purposes of the tax, as made by the statute and construed by the decision of the state court, is thus distinguished in its essential nature from any basis of classification upon which gifts *inter vivos* not made in contemplation of death could be taxed. It follows, therefore, that the legislature can no more bring a gift not made in contemplation of death and therefore not of the essential character of the basis of the classification made by the Statute, within the basis of classification by mere legislative declaration, than it can change the essential character of any other fact or transaction by legislative declaration.

The state court says:

"The legislature does not say that a gift not made in contemplation of death is actually made in contemplation of death. What it says is that if the gift is made

within six years of the donor's death it shall for taxation purposes be construed to fall within the class of gifts made in contemplation of death." (Rec. 46)

That is to say from the fact that the gift is made within six years of the death of the donor, it is conclusively presumed to have been made in contemplation of death. There is no magic in the word "construed". It means the same in the connection in which it is used as the words "conclusively presumed." The statute makes the donees of the gifts as well as the administrators, executors or trustees of the estate of the donor liable for the tax and makes the tax a lien upon the property transferred until paid.

Statutes Sec. 72.05, ante p. 2.

Under the statute as construed by the court, some donees of property are permitted to prove that their gifts were not made in contemplation of death and thus avoid the tax, while others are not so permitted; but, are subjected to the payment of the tax as the result of the conclusive presumption made by the statute that their gifts were made in contemplation of death although the fact be otherwise. That the legislature has no power to enact such a conclusive presumption is established by the authorities, we believe, without exception.

Bailey vs. Alabama, 219 U. S. 219; 31 Sup. Ct. Rep. 148;

Cockrill v. California, 45 Sup. Ct. Rep. 490; (decided May 11, 1925);

Mobile J. & K. C. R. Co. v. Turnipspeed, 219 U. S. 35, 43;

Larson v. Dickey, 39 Neb. 463; 58 N. W. 467;

Howard vs. Mool, 64 N. Y. 268;

M. K. & T. Ry. Co. v. Simonson, 64 Kans. 802; 68 Pac. 653;

Vega S. S. Co. v. Cons. El. Co. 75 Minn. 309;

Cooley's Constitutional Limitations, (7th Ed.) 526;

10 Ruling Case Law, pp. 863, 866; 8 Cyc. 820;

In re Barbour's Estate, 185 N. Y. App. Div. 445, aff'd. by the Court of Appeals, 226 N. Y. 639, without opinion.

In *Bailey vs. Alabama*, *supra*, the statute involved, as originally enacted provided that any person who with intent to injure or defraud his employer, entered into a written contract for service and thereby obtained from his employer money or other personal property, and with like intent and without just cause

and without refunding or paying for the property refused to perform the service, should be punished as if he had stolen it. The statute was subsequently amended so as to make the refusal or failure to perform the service or to refund the property or pay for the property without just cause *prima facie* evidence of the intent to injure or defraud.

This court held that the statute as so amended was unconstitutional. One of the grounds of the decision was that under circumstances stated in the opinion of the court, the presumption would become in effect conclusive upon a bare showing of the refusal or failure to perform the act or service without refunding the money or paying for the property received.

In connection with this ground of the decision, the court said:

"This court has frequently recognized the general power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government. *Gong Yue Ting v. United States*, 149 U. S. 698, 749, 37 L. ed. 905, 925, 13 Sup. Ct. Rep. 1016. In the exercise of this power numerous statutes have been enacted providing that proof of one fact shall be *prima facie* evidence of the main fact in issue; and where the inference is not purely arbitrary, and there is a rational relation between the two facts, and the accused is not deprived of a proper opportunity to submit all the facts bearing upon the issue, it has been held that such statutes do not violate the requirements of due process of law. *Adams v. New York*, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372; *Mobile J. & K. C. R. Co. v. Turnipseed*, decided by this court December 19, 1910 (219 U. S. 35, 55, L. ed.—, 31, Sup. Ct. Rep. 136).

The latest expression upon this point is found in the case last cited, where the court by Mr. Justice Lurton, said: 'That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law, or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. *So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.* If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not

shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."

"In this class of cases where the entire subject matter of the legislation is otherwise within state control, the question has been whether the prescribed rule of evidence *interferes with the guaranteed equality before the law, or violates those fundamental rights and immutable principles of justice which are embraced within the conception of due process of law.*" (Italics ours)

In *Larson vs. Dickey, supra*, with reference to the power of the legislature to enact conclusive presumptions, the court held, that while,

"the legislature has the power to make a tax deed conclusive evidence of compliance with all the requirements of the law which are merely directory, and which pertain to the regulation or the manner of the exercise of the taxing power, *and which requirements it might, in the exercise of its discretion, dispense with entirely*, it has no power to make a tax deed conclusive evidence of any jurisdictional fact, or fact vital to the exercise of the power of taxation" * * *. (p. 169) (Italics ours)

In support of the above proposition, the following cases were cited:

Bannon vs. Burnes, 39 Fed. 892;

Mare vs. Hawthorn, 30 Fed. 579;

Abbott vs. Lindenbauer, 42 Mo. 162;

Wantlan vs. White, 19 Ind. 170;

White vs. Flynn, 23 Ind. 46;

McCready vs. Sexton, 29 Iowa, 356;

Allen vs. Armstrong, 16 Iowa, 508;

Grosbeck vs. Seeley, 13 Mich. 330;

In re Douglass, 41 La. Ann. 765, 6 South 675.

As shown above, the fact that a gift was made by death or in contemplation of death is

"a jurisdictional fact, or fact vital to the exercise of the power" of the legislature to impose an inheritance tax upon it.

As said by the New York Court of Appeals in *Howard vs. Mout, supra*,

"It may be conceded for all the purposes of this appeal that a law that should make evidence conclusive which

was not so necessarily in and of itself and thus preclude the adverse party from showing the truth would be void as indirectly working a confiscation of property or a destruction of vested rights." (p. 268)

In *Barbour's Estate, supra*, the question involved was whether the transfer of the estate of a decedent was taxable under the provisions of the New York transfer act. The act contained a provision that,

"For any and all purposes of this article and for the just imposition of the transfer tax, every person *shall be deemed* to have died a resident and not a non-resident of the state of New York if and when such person shall have dwelt or shall have lodged in this State during and for the greater part of any period of twelve consecutive months in the twenty-four months next preceding his or her death."

In the proceedings for the determination of the tax, it appeared that the decedent had lodged in the State of New York for the period required by the statute in the twenty-four months next preceding his death, notwithstanding which, it was established by the evidence that he was not in fact a resident of the State of New York. It was sought by the taxing authorities to give to the statute the force of a conclusive presumption. In holding that the law could not be so construed, the court said:

"With reference to the power of the legislature to enact a statute of the force which the comptroller seeks to give to the amendment of 1916 to the transfer tax law, while it is not open to serious dispute that it has power to enact that one fact shall be evidence of another, it is a self-evident proposition that the legislature cannot make so that which is not so. When as here the statute says that under the circumstances named residence shall be deemed to exist and the fact is that it does not exist, the statute does not make the fact otherwise than it is. At most, it creates a presumption which may be overcome by evidence to the contrary."

Without attempting to review all of the cases cited, it will be found upon examination that they are all to the same effect upon this question.

It may be said that liability for taxes is ordinarily imposed by the legislature directly on persons and property. But in this case the liability is imposed only on transfers of a certain kind, and whether or not a transfer is of that kind is a question of fact. The legislature in creating the liability for the tax, has

seen fit to make it depend upon a question of fact which in essence is a judicial question, a question for the judiciary rather than for the legislative branch of the government. As we have seen, the power to impose the *kind of tax* which the statute imposes, can be invoked only from a certain state of facts, namely, where the transfer is made by death or in contemplation of death, or to take effect in possession or enjoyment at or after death. To repeat here the language of this court in *Knowlton vs. Moore, supra*,

"Tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being."

To justify such a tax, the necessary basis of fact must exist to invoke the taxing power to impose it. The legislature can make the law to apply to the facts. It cannot make the facts to which the laws is to apply.

In the opinion the state court says:

"The legislature cannot change the essential nature of an existing fact, but it can, on grounds of public policy, give a certain legal import to a fact, and for purposes of classification and for a practical administration of laws it may include in one class cases that fall without it considered individually, but usually falling within it collectively considered." (Rec. 45)

"Our reports show that after the enactment of the inheritance tax law many cases appeared in which elderly men of wealth for the purpose of evading the law made a more or less complete distribution of their property by way of gifts. The *difficulty of proving* that such gifts were made in contemplation of death coupled with the public necessity of not allowing large estates to escape the provisions of the law induce the legislature to make the classification it did. While it may be granted that as to a particular gift not made in contemplation of death the legislature could not declare it to be one made in contemplation of death, it does not by any means follow that in establishing a general class it cannot draw into that class gifts strictly not falling within it, provided that gifts of that class are usually and ordinarily of the kind which the class calls for, and especially where a practical and efficient administration of the law demands the classification." (Rec. 45)

"It is quite true we think to say that of the gifts coming under the statute made by residents of Wisconsin

within six years of their death by far the larger proportion thereof have actually been made in contemplation of death. At any rate there is sufficient basis in fact for the truth of such statement to permit the legislature to act upon it and make a classification accordingly." (Rec. 45, 46)

Practically all of the arguments offered by the court in support of the statute are contained in the parts of the opinion above quoted, and I shall here undertake to answer, *seriatim*, the points advanced therein.

1. If the legislature can impose an inheritance tax on a simple gift made *inter vivos* with no thought or contemplation of death on the part of the donor at the time it is made, *on the ground that it was made in contemplation of death*, it does thereby in legal effect for the purpose of the tax, change the essential nature of the gift from one that was not made in contemplation of death to one that was so made. When we are considering the legal consequences which may be attached to a fact, the *legal import of the fact* is all that we are concerned with. It is the *legal import of the fact* that a gift was made in contemplation of death, which distinguishes it from all other gifts *inter vivos*, and gives to the legislature the right and power to impose an inheritance tax upon it. The legal import of such a transaction is of the same nature as the legal import of a transfer by death, and therefore the same kind of tax may be imposed upon it as on transfers by death.

When the legislature undertakes to give to a simple gift *inter vivos* the legal import of a gift made in contemplation of death, it is giving to it the legal import of a fact of an essentially different nature. If the legislature can do this in the case of such a simple fact as an ordinary gift *inter vivos*, there is no reason why it cannot do the same in the case of any fact and attach to it the legal consequences of a fact of an entirely different nature.

2. The court says that it may so metamorphose the fact "*for purposes of classification*" and for a "*practical administration of laws*."

As applied to the facts of this case, the words, "*for purposes of classification*" mean simply for the purpose of imposing the tax on the gifts in question. And "*for a practical administration of laws*" means, as later explained by the court, for the purpose of dispensing with the necessity on the part of the state of proving the fact that the gift was made in contemplation of death, before imposing an inheritance tax upon it.

3. The terms, "*usually falling within it*" (the basis of classification) "*collectively considered*" as used by the court, are entirely without application to the facts of this case; because, it is impossible to say either as matter of law or as matter of fact that all gifts made within six years prior to the death of the donor *collectively considered are usually made in contemplation of death.*

The statute as it has been construed by the supreme court of the state applies to *every substantial* gift made by a resident of the state.

Estate of Stephenson, 171 Wis. 452, 459.

In that case it was held that a gift of \$23,000 out of an estate aggregating nearly seven millions of dollars, less than one-half of one percent of the estate, was a material part of the estate within the meaning of the statute, and the terms "material part of the estate" as used in the statute were practically held to mean *any gift substantial in amount.*

If gifts may be made at all without being made in contemplation of death, it is self evident that they may be made within six years before the death of the donor as well as at any other period of his life. A gift may be made in contemplation of death at any time during life, and it is equally true that one may be made without any thought of death at any time during life if gifts *causa mortis* are excepted.

In *State vs. Thompson*, 154 Wis. 320, before cited, at pages 329, 330, 331, the court said:

"It is only gifts made in contemplation of death that are taxable. A parent has the right to give his property to any proper subject of his bounty, freed from any transfer tax, provided the contemplation of death is not the cause which impels the making of the donation. * * *

*Common knowledge and experience teach us that aged people frequently give property to their children because of their desire to help them, and without any thought in reference to their own death. * * * * **

Age in itself is not a very important factor in determining the capacity of persons to deal with their property, or in ascertaining the motives which actuated them in disposing of it. The deceased in this case might have made the gifts which he did because he expected to die at any time. *But it was just as reasonable an inference for the trial court to draw that he made the gifts without any particular thought of death* and because he wanted his daughter and her family to enjoy the benefits

of a part of his accumulations and to see her and them use what was given while he was still alive so that he could observe the uses to which it was put. It is an erroneous concept to conclude that aged persons dispose of their property because they think that death is staring them in the face." (Italics ours)

It is also common knowledge and experience that six years is ample time within which a person may contract even a chronic disease and die of it. If it is permissible to enter the field of speculation, we think it may safely be said, that the great majority of people who die were not contemplating or thinking particularly about death as long as six years before the event occurred.

It therefore seems entirely obvious that it cannot be said with any showing of reason, that all gifts substantial in amount, made within six years before the death of the donor, collectively considered, are usually made in contemplation of death. What the court meant by the language last referred to was probably more clearly defined in the statement which followed in which it is said:

"It is quite true we think to say that of the gifts coming under the statute made by residents of Wisconsin within six years of their death by far the larger proportion thereof have actually been made in contemplation of death."

This also, for the reasons above indicated, would seem to be a purely gratuitous statement. At least, there was no evidence before the court to support it. But if we assume it to be correct, is it not entirely immaterial? The statute properly covers all gifts made in contemplation of death. The objection made to its validity is that it also covers a great many including those in this case, which were not made in contemplation of death. Is it important, whether of all the gifts covered by the terms of the statute, a *majority* or only a *minority* may prove to be in fact made in contemplation of death? The fact that those not made in contemplation of death, which are nevertheless taxed by the statute *as gifts made in contemplation of death*, may be a minority rather than a majority of all the gifts covered by the statute, cannot affect the constitutional objection. The rights of the minority under the constitution are entitled to protection as well as those of the majority.

4. The court says: "*The difficulty of proving that such gifts were made in contemplation of death coupled with the public necessity of not allowing large estates to escape the provisions of the law induced the legislature to make the classification it did.*"

This ground offered by the court in support of the statute is the same as that which was offered by the supreme court of Alabama in support of the statute held invalid by this court in *Bailey vs. Alabama*, *supra*. Under the Alabama statute as originally enacted, it was necessary to prove the fraudulent intent, and the difficulty of making proof of such intent was referred to in *ex Parte Reilly*, 94 Ala. 82. In *Bailey v. State*, 158 Ala. 25, which thereafter arose, the state court in upholding the amendment to the statute which was the subject of attack, stated that "*it was the difficulty in proving the intent made patent by that decision*" (The Reilly case) "*which suggested the amendment of 1903.*" (See 219 U. S. at page 233.)

But when the question came before this court, it was not considered that this explanation of the amendment was sufficient to answer the constitutional objection.

The presumption in this case goes farther than the presumption in the case of the Alabama statute, as here it is expressly made conclusive. As said by the state court:

"In our case the legislative intent we think is clear that the specified gifts were to be *conclusively construed* to be gifts in contemplation of death. * *". (Rec. 47)

If the fact that gifts were made in contemplation of death is *important* in determining the classification for the purpose of imposing an inheritance tax on such gifts, the question of whether the fact is difficult or easy to prove would not seem to be material.

5. As to the "*public necessity of not allowing large estates to escape the provisions of the law*", this necessity should not be allowed to supersede the right of the individual taxpayer to have the question of his liability to the tax fairly determined.

The statute does not purport to impose the tax on any gifts *inter vivos* except those made in contemplation of death or intended to take effect in possession or enjoyment at or after the death of the donor. It is not a general tax, but a special tax which purports to be imposed only on transactions of a certain kind and on the parties to those transactions. In any case to which it is claimed the statute applies, the question cannot be avoided whether the transaction was the *kind of transaction* which was intended to be taxed or upon which the legislature had the right to impose the kind of tax the statute imposes. In the determination of this question, the only reason that can be offered for any presumption, one way or the other, is that ordinarily the parties to the transaction are perhaps in better position to know the facts than the state. This might possibly justi-

fy a rebuttable presumption, *but wherein was the necessity for a conclusive presumption?* The definition of the courts as to the meaning of the words, "in contemplation of death" makes the fact susceptible of proof by inference from the physical condition of the donor and the facts and circumstances surrounding the transaction. The facts from which the proper inference should be drawn are not necessarily inaccessible to the state. If it can be said that they are more accessible to the parties to the transaction, it still cannot be assumed that they will not tell the truth about them. The possibility that in some cases they may not do so, is hardly a sufficient reason for foreclosing all inquiry and making the presumption conclusive. In law, facts which may be the subject of controversy *are facts*, when judicially ascertained upon a fair hearing of the question, even though the judicial determination may not in all cases be correct. If the fact that a gift was made in contemplation of death furnishes the only proper basis for imposing an inheritance tax upon it at all as appears to be conceded in the opinion of the state court, it would seem that the tax should not be imposed in a case where the fact that the gift was made in contemplation of death is denied, until it is judicially determined that such was the fact.

The fact that the tax may be avoided in some cases in which it should be imposed because of the impossibility of ascertaining the exact truth, is no reason for imposing the tax in the cases covered by the amendment *without any regard whatever for the truth*.

It is probably correct to say that there is no department of the administration of the laws in which justice may not sometimes miscarry.

6. The court further says: "While it may be granted that as to a particular gift not made in contemplation of death the legislature could not declare it to be one made in contemplation of death, it does not by any means follow that in establishing a general class it cannot draw into that class gifts strictly not falling within it, provided that gifts of that class are usually and ordinarily of the kind which the class calls for * *".

What difference is there in effect, between declaring a gift not made in contemplation of death *to be one so made* and taxing it as such, and drawing it into the *class* of gifts made in contemplation of death and taxing it as a member of the class?

As to the implications involved in the proviso "*provided that gifts of that class are usually and ordinarily of the kind which the class calls for*", we have endeavored to show that there cannot in the nature of things, be any warrant for the assumption

that all gifts that happen to be made within six years before the death of the donor "*are usually and ordinarily made in contemplation of death,*" and shall not repeat the argument on that point.

The court concedes that,

"as to a particular gift not made in contemplation of death the legislature could not declare it to be made in contemplation of death * * *."

Does not the statute in this case *declare* as to each particular gift made within six years prior to the death of the donor as the fact is ascertained by the death of the donor, that it was made in contemplation of death regardless of whether it was or not?

Tax laws operate specifically and impose the tax upon the particular persons or subjects of taxation which come within their terms. The state court expressly holds that the statute does not make a separate class of all gifts made within six years before the death of the donor. But on the contrary holds that it creates only one class, namely gifts made in contemplation of death. Furthermore, that gifts made within six years prior to the death of the donor *could not be* lawfully classified or made a separate class, for the purposes of the tax. (Rec. 47) The statute must therefore apply to each particular gift which comes within its terms, rather than to gifts covered by it as a class. Every gift depends upon the particular facts or circumstances under which it was made as to whether or not it was made in contemplation of death. Obviously, therefore, gifts made within *any period* before the death of the donor cannot be considered as a class, either as having been made in contemplation of death or otherwise; for each of such gifts necessarily depends in that respect on its own particular facts and circumstances.

The court says:

"It is also urged quite strongly that there is no good reason why a gift made six years and one day before death should escape taxation and one made one day short of six years should be taxed. That is true. Neither is there a good reason why a person twenty-one years of age should be allowed to vote while another one day short of twenty-one cannot vote. The sufficient legal answer is that where there is classification by division of time, by number or by weight there must be an arbitrary line drawn somewhere and if the line drawn by the legislature cannot be said to be clearly wrong it must stand." (Rec. 47)

While all that is said here may be true as abstract propositions, it obviously has no application to the facts of this case. We are not dealing with a case where it is difficult to draw the line between what the legislature intended to tax and what it did not intend to tax. The state court expressly holds that it intended to tax only gifts made in contemplation of death. Therefore, *it could not have intended to tax any gifts not made in contemplation of death*. There was no difficulty presented in drawing a correct line, but the statute, draws a line *which is clearly incorrect*, because it results in subjecting to the tax gifts which the court says *the legislature did not intend to tax*, namely, gifts that were not made in contemplation of death. For the purposes of a classification of transfers of property, based on the fact that they were made in contemplation of death, transfers *which were not so made*, are, regardless of *when they were made*, obviously in *direct antithesis* to the basal fact of the classification.

If we may accept the definite construction placed by the state court upon the statute to the effect that only one class of gifts *inter vivos* is created for the purposes of the tax, namely, gifts made in contemplation of death, and that these are the only gifts intended to be taxed, it follows that the amendment to the statute was not intended to extend the classification to include gifts not made in contemplation of death, but was merely intended to avoid proof of the fact that any of the gifts covered by the amendment were ^{not} made in contemplation of death. In other words, to make it consistent with the court's decision, *it must be in the nature of a rule of evidence; a presumption, which instead of being made rebuttable, giving the parties affected an opportunity to be heard, is made conclusive in the cases which it covers.*

In its opinion the state court seems to agree that the tax could not be imposed on the gifts in this case in their true character as simple gifts *inter vivos*, or on any such gifts *as such*, but holds that the tax may be imposed upon them by drawing them into the class of gifts made in contemplation of death and imposing the tax upon them as gifts of that character. But the effect is precisely the same. The legislature can not do by indirection that which, admittedly, it has no power to do directly.

In *Choctaw O. & G. R. Co. v. Harrison*, 235 U. S. 292, 298; 35 S. C. R. 27, 29, this court said:

"Neither state courts nor legislatures by giving a tax a particular name or by the use of some form of words can take away our duty to consider its real nature and effect."

In *St. Louis S. W. Ry. Co. v. Arkansas*, 235 U. S. 350, 35 Sup. Ct. R. 99 (102), the court said:

"Upon the mere question of construction we are, of course, concluded by the decision of the state court of last resort. But when the question is whether a tax imposed by a state deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the state."

The effect of the amendment to the statute is to impose the tax on a certain class of gifts *inter vivos* not made in contemplation of death which the state court expressly holds was intended to be imposed and could lawfully be imposed only on such gifts *inter vivos as were made in contemplation of death*.

All the considerations suggested by the state court in support of the statute will be readily recognized as mere considerations of expediency. None of them meets the specific constitutional objections here urged. The consideration that the amendment to the statute makes for a more practical and efficient administration of the law, as explained in the opinion means nothing more than that the state is thereby relieved of the necessity of making proof of the facts in the cases covered by the amendment. This is accomplished at the expense of denying the taxpayer the right to be heard on the question of fact upon which his liability to the tax admittedly depends. If considerations of mere expediency can suspend the operation of constitutional limitations, such limitations amount to nothing.

There is no question of public policy or of state policy involved. It is, of course, the policy of all the states to enforce their laws and avoid evasions as far as possible. There is no rule of public policy in the state of Wisconsin against the making of gifts, generally speaking. Such a policy would be to discourage charity and benevolence, which no state would admit that it stands for.

As said by the court in *State vs. Thompson, supra*, already quoted,

"It is only gifts made in contemplation of death that are taxable."

The same state policy is affirmed in the opinion of the court in this case. The question of whether a gift is made in contemplation of death or not, is purely a question of fact and there can be

no rule of public policy in a state whose policy is not to tax gifts not made in contemplation of death, which would prevent inquiry into the fact whether a gift in a particular case was so made or not. Whatever inherent difficulty there may be in the practical administration of the law is obviously no ground for disregarding the express limitations of the federal constitution *on the powers of the state*.

POINT II.

THE CLASSIFICATION MADE BY THE STATUTE AS AMENDED, IS INVALID BECAUSE IT INCLUDES GIFTS NOT MADE IN CONTEMPLATION OF DEATH IF MADE WITHIN SIX YEARS PRIOR TO THE DEATH OF THE DONOR, BUT DOES NOT INCLUDE OTHER GIFTS OF LIKE CHARACTER MADE UNDER LIKE CIRCUMSTANCES AND CONDITIONS.

The only answer made in the opinion of the state court to the objection that the classification is invalid because it includes some gifts not made in contemplation of death without including others made under the same circumstances and conditions, is that only one class of gifts is created, and that, gifts made in contemplation of death. This ignores the fact that the statute covers gifts not in fact made in contemplation of death as well as those which were. It is difficult to see how this fact can be ignored when the constitutional objection is raised that this very fact results in an unlawful discrimination. The court holds that the gifts covered by the statute which were not in fact made in contemplation of death, are taxed by the statute, *not in their true character as gifts not made in contemplation of death, but as members of a class which was made in contemplation of death. For the purpose of testing the validity of the classification, are we not entitled to consider the cases which it covers, in their true character and in accordance with the facts?*

The court says that only one class is created, and that the intent of the legislature was to tax only gifts made in contemplation of death, but that gifts not made in contemplation of death are *drawn by the statute into the class*. Whether the statute taxes the gifts *inter vivos* not made in contemplation of death, as a class, or draws them into the class of gifts made in contemplation of death which is taxed, would seem to be a distinction without any real difference, in so far as the right of plaintiffs in error to object to the classification is concerned. The court says:

"We agree with the applicants that the classification will not support a tax as one on gifts *inter vivos* only.

Under such taxation the classification is wholly arbitrary and void. We perceive no more reason why such gifts *inter vivos* should be taxed than gifts made within six years of marriage or any other event." (Rec. 47)

It would seem to follow from this that if the statute had said that all gifts made in contemplation of death are subject to the tax, and also all gifts not made in contemplation of death *provided they are made within six years prior to the death of the donor*, it would be invalid under this ruling of the court. Yet the statute in the form of words in which it was enacted is *precisely the same in effect as though it had been enacted in the form above stated*. Will it be claimed that the validity of the statute depends on the mere difference in the form of words, where there is no difference in meaning and effect between the two forms?

The effect of the statute as construed by the court, is to place all gifts made within six years before the death of the donor even though not made in contemplation of death, in the class for the purposes of the tax with gifts made in contemplation of death, leaving out of the class all other gifts not made in contemplation of death. To justify this discrimination, it is necessary under the well established rules of classification, that there be some substantial distinction between gifts made within six years prior to the death of the donor but not made in contemplation of death, and similar gifts made under precisely the same circumstances and conditions except at different dates with reference to the death of the donor.

The classification must also stand the test of the well established rule, that to be valid it must be rational and the cases included in it must be germane to the basis of the classification.

The authorities by which these rules are established are doubtless familiar to this court, and we shall cite only a few of the many cases that might be referred to.

In *Royster Guano Co. vs. Virginia*, 253 U. S. 412, 415; 40 Sup. Ct. Rep. 560, the court says:

"It is unnecessary to say that the equal protection of the laws required by the Fourteenth Amendment does not prevent the states from resorting to classification for the purposes of legislation. Numerous and familiar decisions of this court establish that they have a wide range of discretion in that regard. But the classification must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation *so that all persons similarly circumstanced shall be treated alike*," (Italics ours)

In *Southern R. Co. vs. Greene*, 216 U. S. 400, 412, 417; 30 Sup. Ct. Rep. 289 at page 291, it is said:

"The equal protection of the laws means subjection to equal laws, *applying alike to all in the same situation.*"
* * *

While reasonable classification is permitted without doing violence to the equal protection of the laws, such classification must be based *upon some real and substantial* distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified *by calling it classification.*" (Italics ours)

These rules and principles of classification have been so frequently declared by this and other courts in substantially the same terms, that they have become stereotyped in the law. To refer to a few of the cases in the Wisconsin Court,

Black vs. State, 113 Wis. 205, 221:

"It is a trite expression that classification in order to be legal must be rational; it must be founded upon real differences of situation or condition which bear a just and proper relation to the attempted classification and reasonably justify a difference of rule."

Borghese vs. Falk, 117 Wis. 327, 353:

"The rules governing classification are familiar and are in brief as follows: It must be based on substantial distinctions which make real differences; it must be germane to the purposes of the law; it must not be limited to existing conditions only; and must apply equally to each member of the class."

Nunnemacher vs. State, 129 Wis. 190, 221:

In order to justify classification there must, of course, be substantial and real differences of situation calling for or reasonably suggesting the necessity for different treatment."

Johnson vs. City of Milwaukee, 88 Wis. 383, 390:

"Certain rules by which the propriety of the classification may be tested have been stated by courts and have become well established."
* * *

"One rule is: all classification must be based upon substantial distinctions which make one class *really different from another*." (Italics ours)

The transaction which is taxed is the gift *and the liability for the tax is imposed upon the donee and the property received as well as upon the legal representatives of the donor*.

Statutes, Sec. 72.05, ante p. 2.

To show as graphically as possible, that the mere fact that one gift is made within the period of the statute and another not, does not afford any basis of distinction to justify discrimination, we will take the following illustration:

A has \$200,000 which on the first of January, 1918 he desires to divide between his two sons. He is in the prime of life and is not contemplating death. On that day he gives to one, \$100,000 and on the next day, the 2nd of January, to the other the same amount in the same kind of property. He dies on the second of January, 1924. Under the amendment, the one who receives the second \$100,000 will be subject to the tax, while the other would not. They were related to the donor in precisely the same way. They received the same amount of the same kind of property and the gifts were actuated by precisely the same motives and were made under the same conditions, the only difference being that they were made one day apart because, we will assume, it took two days for the donor to make the division.

For comparison, we refer to a case in the state supreme court, *Black vs. State, supra*, where the court based its decision holding the law in that case invalid on a somewhat similar illustration. The law involved was an inheritance tax law which exempted all estates under \$10,000 from taxation. In the opinion, holding the law invalid, the court said:

"Thus it results that one collateral relative receiving a legacy of \$2,000, from one testator, whose estate amounts to but \$9,500, pays no tax, while another collateral relative in the same degree, receiving a legacy of \$2,000 from another testator, whose estate amounts to \$10,500, is obligated to pay a tax. Here is unlawful discrimination, pure and simple. No rational distinction or difference can be drawn between the two legatees simply because the estates from which their legacies come are of slightly different size. They are both within the same class, surrounded by the same conditions, and receiving the same benefits. One pays a tax, and the other does not. This is not the equal protection of the laws." (Italics ours) (p. 222).

Paraphrasing the language of the court in that case and applying it to the two donees in the illustration given above in this case, "no rational distinction or difference can be drawn between the two sons simply because they received their gifts on slightly different dates. They are both within the same class, surrounded by the same conditions and receiving the same benefits. One pays a tax and the other does not. This is not the equal protection of the laws."

In the case of any two gifts made by different individuals at the same time, neither of which is in fact made in contemplation of death, *each is subject to the same contingency as to whether the donor will or will not live longer than six years.* There is therefore no distinction whatever between them in this respect *at the time they were made.*

The character of the transaction is fixed by the motive which actuated it and by the circumstances and conditions under which the gift was made and cannot, of course, be affected by the circumstance whether the donor may happen to live one year or six years, *after it was completed.* Yet in the case of a gift where the donor dies within six years after it was made, the donee and the property in his hands are subject to the tax, while in the case of a gift made under precisely the same circumstances and conditions, if the donor lives more than six years, the gift is not subject to the tax and the donee is not required to pay it.

In *State ex rel Milw. Sales & Investment Co. vs. Railroad Commission*, 174 Wis. 458, the court said:

"The provisions of both the federal and state constitutions guaranteeing equal protection of the laws were intended to safeguard the fundamental right of equality before the law and to prevent the enactment of a law which makes unjust discrimination *by depriving one person of a right in dealing with his property which it grants another of the same class under like circumstances.*" (Italics ours; syllabus).

And this court in *Southern R. Co. vs. Greene, supra*, declared:

"The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation. If the plaintiff is a person within the jurisdiction of the State of Alabama within the meaning of the Fourteenth Amendment, it is entitled to stand before the law upon equal terms, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon, other persons in a like situation."

We understand the state court to concede that the mere fact that gifts were made within a given time before the death of the donor does not in itself afford a legal basis for classifying such gifts for purposes of taxation. The court expressly holds, that ordinary gifts *inter vivos* made within six years before the death of the donor could not be taxed as a separate class; and that to so classify them without including all other ordinary gifts made *inter vivos* in the class, would be to make a wholly arbitrary and void classification. (Rec. 47) This is obviously so, for there can be nothing in the mere circumstance that the donor in one case lives five years after making the gift and in another seven years, to make one of the transactions really different in kind, quality or character from the other.

THE CLASSIFICATION IN SO FAR AS IT INCLUDES GIFTS NOT MADE IN CONTEMPLATION OF DEATH MERELY BECAUSE THEY WERE MADE WITHIN SIX YEARS PRIOR TO THE DEATH OF THE DONOR, IS ARBITRARY, IRRATIONAL AND UNREASONABLE.

In *Gulf C. & S. F. Ry. Co. vs. Ellis*, 165 U. S. 150, 159, this court said:

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection."

And in *Southern R. Co. vs. Greene*, *supra*, at page 417:

"The classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification."

In *Black vs. State*, *Supra*, at page 221, the Wisconsin court said:

"It is a trite expression that classification in order to be legal must be rational."

As held by the state court in this case, *the basis of the classification* is the fact that the gifts were made in contemplation of death. The mere fact that the donor may happen to die within six years after making a gift, in itself, without regard to any of the facts and circumstances which attended the making of the gift is obviously an independent fact not necessarily connected with or in any way related to the motives or considerations which led to the making of the gift. Death must follow

a gift made *inter vivos* at some time, and whenever it occurs the inquiry is naturally suggested under the statute, whether the gift was made in contemplation of death. *The time or date of the death* of the donor following the gift, is obviously *in itself*, irrelevant upon the question of the motive which actuated the gift. Whether it is relevant or not *depends upon the facts and circumstances to be considered in connection with it*. If it be shown that the donor was suffering from a fatal disease at the time of making the gift and died within a short time thereafter, the time of death would be a significant and important circumstance; but if the donor were killed shortly after making the gift in a railroad wreck, the time between the making of the gift and his death would be obviously irrelevant.

It is a matter of common knowledge that the motives or considerations by which people are induced to make gifts are as various as their different interests, individualities and relationships. As recognized by the supreme court of Wisconsin, in one of the cases cited, the mere fact that one may make a gift of a large part of his estate even in his old age, to a child, is not in itself sufficient to warrant the inference that the gift was made in contemplation of death because these facts standing alone are equally consistent with other motives which might have actuated the gift.

As one may make a gift *at any time during his life* as the result of any one or more, of a number of motives or considerations, it seems entirely obvious that in singling out gifts made within six years prior to the death of the donor to be included in the classification of gifts made in contemplation of death, *the statute makes a purely arbitrary selection*. The fact upon which the selection is based has no necessary relationship whatever to the *basis of the classification*. The mere fact that one may die within six years after making a gift can not *in itself*, afford any basis for inference that the gift was made in contemplation of death. As there is no reasonable basis for the conclusive presumption which the statute creates, it must be arbitrary.

The basis of selection as applied to the gifts covered by the amendment is not only arbitrary, but is speculative and highly capricious, and anything but reasonable or rational.

After the gift has been made and the transaction closed, the donor no longer has any connection with the property except that his legal representatives may be called on to pay the tax on it if he die within six years. Whether or not it will become subject to the tax in the hands of the donee is made by the statute a pure lottery depending upon the chances of life and death of

the donor during a period of six years after he has parted with his title. One in the prime of life and the best of health may make a gift in the morning and be killed by a stroke of lightning in the afternoon. The donee finds that he and the gift he received in the morning have become liable to the tax during the day, through no act of his but by a pure accident entirely disconnected with the property or the transaction through which it was received.

Under the decisions of the Supreme Court of the State, the tax is imposed according to the value of the property and at the rates in force, *at the time of the death of the donor*.

Estate of Stephenson, 171 Wis. 452, 457.

Until the death of the donor or the expiration of six years, no one can tell what the amount of the tax will be, or whether there will be a tax at all. The tax is upon the *transfer* made by the gift, but it is not determined, either as to amount or whether or not there will be a tax, by *the fact of the transfer* or by any circumstances or conditions existing at the time; but by a contingency in the future entirely disconnected with the transfer, in no way related to it and entirely beyond human control as to whether it happens or not. One offered a gift might not wish to accept it, if he knew or thought he would have to pay a tax, the amount of which could not then be computed. But there is no way of telling, however hale and hearty the donor may be, or whatever the motive of the gift.

Can such a basis of selection of gifts *inter vivos* for purposes of the tax, be supported as reasonable or rational? Is it not purely arbitrary, unreasonable and irrational, not to say freakish?

NONE OF THE CONSIDERATIONS OFFERED BY THE STATE COURT IN SUPPORT OF THE STATUTE, AFFORDS ANY ANSWER TO THE OBJECTION THAT THE CLASSIFICATION IS INVALID BECAUSE OF THE UNWARRANTED DISCRIMINATION IT MAKES BETWEEN GIFTS INTER VIVOS NOT MADE IN CONTEMPLATION OF DEATH.

The difficulty of proof referred to in the opinion is certainly no answer to this objection. It can be no more difficult to prove the fact in the case of a gift made in contemplation of death within six years prior to the death of a donor than in the case of one made a longer time before his death. It is no answer to this objection to say that the amendment makes for a more practical and efficient administration of the law. The law would be even easier to administer, evasion of it would be made even more difficult, and it would yield better results to the state if it were

made to apply to all gifts whenever made, regardless of whether made in contemplation of death or not. If it can be made to apply to all gifts within six years prior to the death of the donor, there is no reason why it could not be made to apply to all gifts whatsoever and it should so apply, to avoid unconstitutional discrimination.

POINT III.

THE RIGHT TO MAKE AN ORDINARY GIFT OF MONEY OR PROPERTY WHICH MAY BE COMPLETED BY MANUAL DELIVERY IS A PROPERTY RIGHT. BECAUSE THE GIFTS IN THIS CASE INCLUDE PROPERTY OF THAT CHARACTER, AND THE TAX IMPOSED IS AT A PROGRESSIVE RATE, DIFFERENT FROM OTHER PROPERTY TAXES, THE STATUTE DENIES TO PLAINTIFFS IN ERROR THE EQUAL PROTECTION OF THE LAW.

Keeney vs. New York, 222 U. S. 525, involved gifts *inter vivos* of future interests in real estate, and limitations over of a more or less artificial character. The question raised was whether the New York transfer tax as applied to such gifts was a property tax. In holding that it was not, the court said:

"So much of the New York statute as imposes an inheritance tax was sustained in *Plummer v. Color*, 178, U. S. 115, 44, L. ed. 998, 20 Sup. Ct. Rep. 829, and in several decisions of the court of appeals of that state. But the plaintiffs insist that there is a radical difference between an inheritance tax and one on transfers *inter vivos*. The first, they say, is an excise imposed on a privilege; while that complained of here is really on property, though called a tax on a transfer. They argue that inheritance taxes have been sustained on the ground (*United States vs. Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073) that no one has the natural right to acquire property by will or descent, and if the state permits such acquisition, it may require the payment of a tax as a condition precedent to the right of using that privilege. On the other hand, they contend that the right to convey or come into possession does not depend upon a statutory or taxable privilege, but is a right incident to the ownership of property, and that the tax imposed by this statute on that right is in effect a tax on the property itself, and void because lacking in the elements of uniformity and equality required in the assessment of property taxes.

But, if any such distinction could be made between taxing a right and taxing a privilege, it would not avail

plaintiffs in the present case. There is no natural right to create artificial and technical estates with limitations over, nor has the remainder-man any more right to succeed to the possession of property under such deeds than legatees and devisees under a will. The privilege of acquiring property by such an instrument is as much dependent upon law as that of acquiring property by inheritance, and transfers by deed to take effect at death have frequently been classed with death duties, legacy and inheritance taxes . . .

The statute here in question makes no distinction between property, the title to which may be transferred by mere delivery accompanied by the intent to make a gift, and artificial interests in real estate such as was involved in the case above cited, or stock in corporations which in order to complete the transfer must be transferred on the books of the corporation.

The gifts in this case included gifts of cash amounting to \$178,112.64 as well as stocks in corporations. (Rec. 15)

In *Thomas vs. U. S.*, 192 U. S. 363, the question raised was the validity of a stamp tax on the transfer of certificates of stock. It was claimed that the tax was in reality a tax on the stock and therefore a property tax. The court held otherwise on the ground that:

"The sale of stocks is a particular business transaction in the exercise of the privilege afforded by the laws in respect to corporations of disposing of property in the form of certificates. The stamp duty is contingent on the happening of the event of sale and the element of absolute and unavoidable demand is lacking." (p. 371)

The court in its opinion likened the tax to taxes on sales at exchanges or boards of trade and on the transmission of property from the dead to the living.

As the gifts in this case include gifts of money, the question here presented is whether the right to make such a gift which may be consummated by manual delivery without the aid of the legislature, or of any of the machinery of government, is not a property right inherent in the ownership of the property.

It is true the state court in this case holds that the tax in question is not a property tax, but for the purposes of the constitutional questions involved, this court is not bound by this interpretation of the statute by the state court.

St. L. & S. W. Ry. Co. vs. Arkansas, *Supra*, 235 U. S. 350.

Furthermore, the grounds upon which the ruling of the state court was made, were obviously contrary to the facts. The ruling of the court was,

"* * the tax in question is not a property tax, but a tax upon the right to receive property from a decedent." (Rec. 44)

The gifts in this case as we have seen were not received from a decedent. On the contrary, about half of them were made more than four years before the death of the decedent, and it is judicially established that none of them was made in contemplation of death, or intended to take effect in possession or enjoyment at or after the death of the decedent.

The state constitution, *Section 1 of Article 8* explicitly prescribes the subject matter upon which taxes may be imposed in the state of Wisconsin in the following terms:

"The rule of taxation shall be uniform and taxes shall be levied upon such property as the legislature shall direct. Taxes may also be imposed on incomes, privileges and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided."

Under these express provisions of the state constitution, to impose a tax on gifts *inter vivos*, it must be imposed either as a tax on property, or as a tax on a *privilege*. It is not a tax on income or occupation.

As applied to gifts made in contemplation of death which are universally regarded by the courts as testamentary in character and in the nature of inheritances, it has generally been held that such taxes are taxes on a privilege. As stated in *Ruling Case Law*, summarizing the leading cases on the subject:

"An inheritance tax in any of its customary forms is not a tax on the property of the decedent with respect to which it is levied, but is an excise imposed on the privilege of transmitting or receiving property upon the death of the owner, and consequently is not subject to any of the constitutional limitations upon taxes on property found in the state constitutions."

Vol. 26, Sec. 167, p. 196.

Can it be successfully claimed that the right to make an ordinary gift of personal property which the owner may make by simply delivering the property to another with the intent that it shall belong to such other, a mere privilege in the sense that it is the creature of artificial law?

The right to make such a gift antedates, of course, the adoption of any of our constitutions. It is not a creature of the law, but a natural right. Governments do not create such rights but are organized, under our system at least, to protect them. The right to make gifts is as old as the right of private ownership of property and is implied by such ownership. To dispose of property in this way is to exercise an ordinary right of ownership. If an inherent right of ownership cannot be exercised without the payment of a tax, is not the tax, a tax on the right of ownership? A tax on a right of ownership of a thing, is in law a tax on the thing owned.

Dawson vs. Kentucky Distilleries & Warehouse Co.,
255 U. S. 288.

In that case a tax was imposed by the state of Kentucky upon the business of removal by the owner of whisky from a public warehouse. It was camouflaged as a tax on the *business* of owning and storing whisky in bonded warehouses. The court held that the tax was not in reality on the *business* of owning and storing whisky in bond or upon the *business* of removing the liquor owned, but was in reality a tax on the *right* of removing the liquor from the warehouse. As to the nature of the tax, the court said:

"But as stated by the lower court, 'the thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable: i. e., consumption, sale or keeping for future consumption or sale . . . The whole value of the whisky depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value.' To levy a tax by reason of ownership of property is to tax the property. (Citing cases.) It cannot be made an occupation or license tax by calling it so. (Citing cases.) The language of the emergency clause in the act discloses that the legislature considered that it was, in fact, taxing the whisky.

As we hold the tax to be one on property, and it is conceded that, if it be such, it is invalid under the state constitution, we have no occasion to consider whether it would be also invalid under the state constitution as a license or excise tax, because conf~~iscatory~~." (p. 294)

It is firmly established that an excise tax may be imposed upon business and occupations of various kinds. But this court in the case just cited draws the distinction between a tax

on a *business* and a tax upon the exercise of an ordinary act of ownership of property. The right to give property away, to part with the title to it, in so far as it does not require the aid of any legal machinery or assistance of governmental functions or regulations, is inherent in the dominion of the owner over his property. The law cannot require him to keep it. But, if it can tax his right to give it away without the limitations which apply to property taxation, it may virtually make the exercise of the right prohibitive, and practically destroy the right.

Knowlton vs. Moore, supra.

On the other hand, if it is a property right the power of taxation with respect to it is limited by the rules which apply to property taxation and it is entitled to the protection afforded to property rights and natural rights by the guaranties of the federal constitution.

It is difficult, if not impossible, to define property in the legal sense without including in the definition the power of disposition.

As said by the Court of Appeals of New York in *Wynchamers vs. People*, 13 N. Y. 378, 396:

"Nor can I find any definition of property which does not include the power of disposition and sale as well as the right of private use and enjoyment. Thus Blackstone says (1 Comm. 138): 'The third absolute right of every Englishman, is that of property, which consists in the free use, enjoyment and *disposal* of all his acquisitions, without any control or diminution, save only by the laws of the land.' Chancellor Kent says (2 Comm. 320): 'The exclusive right of using and *transferring* property follows as a natural consequence from the perception and admission of the right itself.' And again (p. 326): 'The power of *alienation of property* is a necessary incident to the right, and was dictated by mutual convenience and mutual wants.' By another author property is defined as an 'exclusive right to things, containing not only a right to use those things, but a right to dispose of them, either by exchanging them for other things or giving them away to any person without consideration, or even throwing them away.' Bouv. Law Dict. tit. Property. These definitions are in accordance with the general sense of mankind. Indeed, if any one can define property eliminated of its attributes, incapable of sale,

and placed without the protection of law, it were well that the attempt should be made."

And in *Ruling Case Law*, Volume 26, Section 19, at page 36:

"A tax on a thing is a tax on all its essential attributes, and a tax on an essential attribute of a thing is a tax on the thing itself. So that a tax on a thing owned is necessarily a tax on the right of ownership thereof; and a tax on the right of ownership of a thing is necessarily a tax on the thing itself. No definition of property can be framed which does not include the right of ownership. Consequently, no tax can be imposed *on the right of ownership* which is not also a tax on property." (Italics ours)

And again, Sec. 210, at p. 237:

"An imposition in the form of an excise cannot be sustained as such if it is merely an indirect method of levying a property tax, and accordingly it has been held that a tax upon the business of extracting turpentine from standing trees is unconstitutional. Likewise a tax of a certain per cent upon every judgment entered in a court of record has been held invalid on the ground that the legislature cannot arbitrarily impose a burden on the right to litigate disputed claims." 26 *Ruling Case Law*, p. 237, Sec. 210.

In *Dawson vs. Kentucky Distilleries & Warehouse Co.*, *supra*, as part of the grounds of the decision that the tax was on the property, the court said, that while the tax was made primarily payable by the warehouseman, the state was given a lien upon the warehouse and the whisky therein; that the warehouseman could get reimbursement through subrogation to the state's lien on the whisky belonging to the owners, so that the whisky itself must ultimately bear the burden of the tax.

So in this case, the statute (Sec. 72.05, ante p. 2) makes the tax a lien upon the property transferred until paid. The liability for the tax is thus imposed directly upon the property transferred.

The tax is imposed at a progressive rate which could not be justified except on the theory that the legislature has practically a free hand to impose the tax at any rate it pleases even to the point of confiscation of the property.

The section of the statute as to rates, omitting parts not material is as follows:

"72.02 *Primary rates, where not in excess of twenty-five thousand dollars.* When the property or any beneficial interest therein passes by any such transfer, where the amount of the property shall exceed in value the exemption specified in Section 72.04, and shall not exceed in value twenty-five thousand dollars, the tax hereby imposed shall be:

- (1) Two per centum, etc. * * * * *

"72.03 *Other rates, where in excess of twenty-five thousand dollars.* * * * * *

- (1) * * * * * Upon all in excess of twenty-five thousand dollars and up to fifty thousand dollars two times the primary rates.

- (2) * * * * * Upon all in excess of fifty thousand dollars and up to one hundred thousand dollars, three times the primary rates.

- (3) * * * * * Upon all in excess of one hundred thousand dollars and up to five hundred thousand dollars, four times the primary rates.

- (4) * * * * * Upon all in excess of five hundred thousand dollars, five times the primary rates."

As to the limitations upon the legislature in property taxation as held by the supreme court of the state in *Beals vs. State*, 139 Wis. 544, 557:

"As to the taxation of property there can be no classification which interferes with substantial uniformity of rate base on value."

"As to excise taxation there may be proper classification and different classes and the term '*uniformity of taxation*' means simply taxation which acts alike on all persons similarly situated.

"The inheritance tax levied by Chapter 44 Laws of 1903 is not a tax upon the property or property rights in any sense, but merely an excise tax levied upon the transfer or transaction and merely measured in amount by the amount of property transferred." (Italics ours)

There has been no modification in this state of the rules laid down in this decision.

POINT IV.

TO ANNUL THE AMENDMENT WILL RESULT MERELY IN LEAVING THE STATUTE IMPOSING THE TAX ON INHERITANCES AND GIFTS MADE IN CONTEMPLATION OF DEATH, AS IT WAS BEFORE THE AMENDMENT, WITHOUT SERIOUS CONSEQUENCES TO THE STATE.

As will be seen by reference to the statutes (ante pp. . . .) the law making the classification and imposing the tax was complete before the Amendment. The only purpose of the amendment was to make *an arbitrary rule* bringing certain cases within the basis of classification *regardless of the facts* and some of which are precisely antithetical to the basis of classification. While numerous estates have been administered and closed under the law since the amendment, no recovery of any inheritance taxes paid on gifts *inter vivos* could be had without satisfactory proof that the gift was not made in contemplation of death, and only then as matter of legal right where the payment was made under protest and the statute of limitations has not expired. To annul the amendment, will promote the ends of justice and work no injustice.

CONCLUSION.

In conclusion, it is respectfully submitted that the judgment of the state court should be reversed and the provision of the law in question held to be unconstitutional and void.

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